

Lawrence J. Gornick (SBN 136290)  
Debra DeCarli (SBN 237642)  
Laura M. Brandenburg (SBN 238642)  
**LEVIN SIMES KAISER & GORNICK LLP**  
44 Montgomery Street, 36<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 646-7160  
Fax: (415) 981-1270  
[lgornick@lskg-law.com](mailto:lgornick@lskg-law.com)  
[ddecarli@lskg-law.com](mailto:ddecarli@lskg-law.com)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – OAKLAND**

CAROL MOORHOUSE and JAMES  
MOORHOUSE,

Plaintiffs,

vs.

BAYER HEALTHCARE  
PHARMACEUTICALS, INC.; BAYER  
HEALTHCARE LLC; GENERAL ELECTRIC  
COMPANY; GE HEALTHCARE, INC.;  
COVIDIEN, INC.; MALLINCKRODT, INC.;  
BRACCO DIAGNOSTICS, INC.; McKESSON  
CORPORATION; MERRY X-RAY  
CHEMICAL CORP.; and DOES 1 through 35

Defendants.

Case No: 4:08-cv-01831-SBA

(San Francisco County Superior Court,  
Case No.: CGC-08-472978)

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS GENERAL ELECTRIC  
COMPANY AND GE HEALTHCARE INC.'S  
APPLICATION TO STAY ALL  
PROCEEDINGS PENDING TRANSFER TO  
MDL**

Date: June 10, 2008  
Time: 1:00 p.m.  
Courtroom: 3, Third Floor

Plaintiffs file this Opposition to Defendants' Application to Stay for consideration with their Motion for Remand. Both motions are set for hearing on June 10, 2008. Plaintiffs request that their Motion for Remand be considered before Defendants' Application to Stay. Should the Court grant Plaintiffs' Motion for Remand, Defendants' Application to Stay will be rendered moot.

**BACKGROUND**

Mrs. Moorhouse suffers from Nephrogenic Systemic Fibrosis ("NSF"), an incurable and life-threatening disease. She contracted the disease as a result of receiving gadolinium based contrast

1 agents ("GBCA") in connection with MRI and MRA procedures. The GBCAs were manufactured by  
2 General Electric Company, GE Healthcare Inc. ("GE"), Bayer Healthcare Pharmaceuticals, Inc., Bayer  
3 Healthcare LLC ("Bayer"), Covidien Inc., Mallinckrodt, Inc. and Bracco Diagnostics Inc., and  
4 distributed by McKesson Corporation ("McKesson") and Merry X-Ray Chemical Corporation ("Merry  
5 X-Ray"). Complaint at ¶¶43-62.

6 Mrs. Moorhouse and her husband, James Moorhouse, filed suit in San Francisco Superior  
7 Court on March 5, 2008 against two in-state defendants (McKesson and Merry X-Ray) and seven out-  
8 of-state defendants (GE, Bayer, Covidien Inc., Mallinckrodt, Inc. and Bracco Diagnostics Inc.) The  
9 GE Defendants ("Removing Defendants") removed this matter on April 4, 2008. Removing  
10 Defendants allege in their removal that the two in-state defendants are fraudulently-joined and,  
11 therefore, their California residencies should be ignored for purposes of determining diversity  
12 jurisdiction. Plaintiffs filed their Motion for Remand on April 22, 2008 (Docket No. 17).

13 On April 24, 2008, the GE Defendants filed their Application to Stay All Proceedings Pending  
14 Transfer to the MDL. The MDL, known as In re: Gadolinium Contrast Dyes Products Liability  
15 Litigation ("Gadolinium MDL"), was created on February 27, 2008 and is presided over by the  
16 Honorable Dan A. Polster of the Northern District of Ohio.

17 On April 23, 2008, this case was subjected to a Conditional Transfer Order No.5 ("CTO-5").  
18 Plaintiffs filed a Notice of Opposition to CTO-5 on May 7, 2008. Exhibit A to Declaration of Laura  
19 Brandenburg. Plaintiffs' will file and serve their Motion and Brief to Vacate the Conditional Transfer  
20 Order with the Judicial Panel on Multidistrict Litigation by May 23, 2008. No date for hearing on  
21 Plaintiffs' Motion and Brief to Vacate the Conditional Transfer Order has been set by the Panel.  
22 Pursuant to Rule 7.4(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, the  
23 CTO is stayed pending further order of the Panel. Exhibit B and C to Declaration of Laura  
24 Brandenburg.

25 Both the Motion for Remand and Application to Stay will be heard on June 10, 2008.

26 ///

27 ///

## LEGAL ANALYSIS

### **A. Plaintiffs' Motion for Remand Presents a Preliminary Jurisdictional Issue That Should Be Decided by This Court Prior to Defendants' Application to Stay.**

Requests for transfer pending before the MDL Panel do not limit the pre-trial jurisdiction of the district court. *Conroy v. Fresh Del Monte Produce Inc.*, 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004); *Gerber v. Bayer Corp*, 2008 U.S. Dist. Lexis 12174, \*5 (Case No. 07-05918, N.D. Cal. 2008); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1359 (C.D. Cal. 1997). District Courts have discretion to decide whether to stay a case pending a decision from the MDL Panel. *Conroy*, 325 F. Supp. 2d at 1053. "A district judge should not automatically stay discovery, postpone rulings on pending motions, or generally suspend further rulings upon a parties' motion to the MDL Panel for transfer and consolidation." *Rivers* 980 F. Supp. at 1360.

A motion to remand is considered a preliminary jurisdictional issue that should be resolved as early as possible. *Conroy*, 325 F. Supp. 2d at 1053. "Where case-specific issues of fact or law are raised by a motion to remand and a defendant has clearly failed to meet the substantive or procedural requirements for removing a state court action, 'the court should promptly complete its consideration and remand the case to state court.'" *Edsall v. Merck & Co.*, 2005 U.S. Dist. Lexis 42408, \*9 (Case No. 5-2244, N.D. Cal. 2005) (citations omitted). Plaintiffs' Motion for Remand clearly demonstrates that GE has failed to meet the requirements for removal. Therefore, Plaintiffs' Motion for Remand should be decided prior to Defendants' Application to Stay.

### **B. If the Court Considers Defendants' Stay Application With the Motion for Remand, The Application Should Be Denied.**

Defendants rely on *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358 (C.D. Cal. 1997) in support of their argument that Courts simply look to considerations of judicial economy and prejudice to the parties when determining an application to stay. Application p.3. However, *Rivers* did not involve the jurisdictional issue present in Plaintiffs' competing motion for remand, and further analysis is necessary.

In *Conroy v. Fresh Del Monte Produce Inc.*, 325 F. Supp. 2d 1049 (N.D. Cal. 2004), this Court

1 set out a three step methodology for addressing competing motions for remand and motions to stay as  
2 follows:

- 3 1. First, the court should give preliminary scrutiny to the motion to remand, promptly  
4 completing its consideration and remanding the case if removal was improper.
- 5 2. Second, if the jurisdictional issue appears factually or legally difficult, the court  
6 should determine whether identical or similar jurisdictional issues have been raised  
7 in other cases that have been or may be transferred to the MDL.
- 8 3. Finally, and only if the second inquiry is reached and answered affirmatively, the  
9 court should consider staying the action, weighing the following factors: a) interests  
10 of judicial economy; b) hardship and inequity to the moving party if the action is  
11 not stayed; and c) potential prejudice to the non-moving party.

12 *See Conroy v. Fresh Del Monte*, 325 F. Supp. 2d 1049, 1053; *Meyers v. Bayer AG*, 143 F. Supp 2d  
13 1044, 1048-1049 (E.D.Wis.1002); *Strong v. Merck & Co.*, 2005 U.S. Dist. LEXIS 2413, at \*7 (Case  
14 No. 03-813, N.D. Cal. 2005); *Edsall*, 2005 U.S. Dist. LEXIS 42408 at \*8.

15 As explained above, removal was clearly improvident and the case should be remanded  
16 immediately.

17 In the event that the Court views the jurisdictional issues as factually or legally difficult, it  
18 should still address Plaintiffs' Motion to Remand first because there is no evidence that identical or  
19 similar jurisdictional issues have been raised in other cases that have been or may be transferred to the  
20 MDL.

21 Only if the Court has first determined that the jurisdictional issues are legally or factually  
22 difficult, and has further determined that those issues are common to others in or pending transfer to  
23 the MDL, should the Court then consider a stay pending transfer. The following factors should then  
24 be weighed: a) interests of judicial economy; b) hardship and inequity to the moving party if the action  
25 is not stayed; and c) potential prejudice to the non-moving party.

26 ***1. Stay and Transfer Results in Inefficiency***

27 It is unlikely that more than a few actions will be transferred to the Gadolinium MDL which  
28

1 will involve the issue of whether, *under California law*, it is possible for Plaintiffs to assert negligence  
 2 and CLRA claims against McKesson and Merry X-Ray. Those issues are specific to California law  
 3 and to this case, and can be most efficiently decided by a California court. In denying Defendants'  
 4 motion to stay in *Conroy* the court explained that, "[t]his Court is readily familiar with federal law,  
 5 Ninth Circuit law, and California law, the laws applicable to Plaintiff's motion and Complaint.  
 6 Moreover, the parties have already fully briefed the issue of remand. Thus, staying the motion will not  
 7 save either party any time. Finally, it is in the interest of judicial economy to decide issues of  
 8 jurisdiction as early in the litigation process as possible. If federal jurisdiction does not exist, the case  
 9 can be remanded before federal resources are further expended. In the Court's view, judicial economy  
 10 dictates a present ruling on the remand issue." *Conroy*, 325 F. Supp. 2d at 1054. The same rationale  
 11 applies here. This Court is better equipped to efficiently deal with California legal issues than is the  
 12 Gadolinium MDL Court in Ohio. The parties will have fully briefed the jurisdictional issues and will  
 13 be available to argue them on June 10. The antithesis of efficiency would be to refer the motion to a  
 14 judge in Ohio for decision months in the future.

15 ***2. Stay and Transfer Results in no hardship to GE but is Prejudicial to Plaintiffs***

16 GE will not suffer any hardship if this matter is not stayed, and has not asserted that it will.  
 17 The same cannot be said for Plaintiff. Carol Moorhouse suffers from a progressive and incurable  
 18 disease. If this Court stays Plaintiffs' case pending transfer to the MDL, Plaintiffs will suffer delays  
 19 waiting for the transfer to occur. The conditional transfer order has been stayed pending further order  
 20 from the Panel. If the Stay is granted, Plaintiffs' case will be not transfer to the MDL until an order  
 21 from the Panel is issued. A hearing on Plaintiffs' Motion to Vacate the CTO has not been set, and any  
 22 order from the Panel could take several months. If this case is transferred to the MDL, it is likely that  
 23 it would then take several additional months for the MDL Court to hear and decide Plaintiffs' remand  
 24 motion, resulting in prejudice to Plaintiffs.

25 ///

26 ///

27 ///

1 **CONCLUSION**

2 For the foregoing reasons, Plaintiffs' respectfully request that Plaintiffs' Motion for Remand be  
3 granted, and Defendants' Petition to Stay be denied as moot.

4  
5 Dated: May 20, 2008

LEVIN SIMES KAISER & GORNICK LLP

6  
7 By: s/ Lawrence J. Gornick  
Lawrence J. Gornick (CA SBN 136290)  
8 LEVIN SIMES KAISER & GORNICK, LLP  
44 Montgomery Street, 36<sup>th</sup> Floor  
9 San Francisco, CA 94104  
Telephone: (415) 646-7161  
10 E-mail: lgornick@lsgk-law.com

Lawrence J. Gornick (SBN 136290)  
Debra DeCarli (SBN 237642)  
Laura M. Brandenburg (SBN 238642)  
**LEVIN SIMES KAISER & GORNICK LLP**  
44 Montgomery Street, 36<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 646-7160  
Fax: (415) 981-1270  
[lgornick@lskg-law.com](mailto:lgornick@lskg-law.com)  
[ddecarli@lskg-law.com](mailto:ddecarli@lskg-law.com)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – OAKLAND**

CAROL MOORHOUSE and JAMES  
MOORHOUSE,

Plaintiffs,

vs.

BAYER HEALTHCARE  
PHARMACEUTICALS, INC.; BAYER  
HEALTHCARE LLC; GENERAL ELECTRIC  
COMPANY; GE HEALTHCARE, INC.;  
COVIDIEN, INC.; MALLINCKRODT, INC.;  
BRACCO DIAGNOSTICS, INC.; McKESSON  
CORPORATION; MERRY X-RAY  
CHEMICAL CORP.; and DOES 1 through 35

Defendants.

Case No: 4:08-cv-01831-SBA

(San Francisco County Superior Court,  
Case No.: CGC-08-472978)

**DECLARATION OF LAURA M.  
BRANDENBERG IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO GENERAL  
ELECTRIC COMPANY AND GE  
HEALTHCARE INC.'S APPLICATION TO  
STAY ALL PROCEEDINGS PENDING  
TRANSFER TO MDL**

Date: June 10, 2008  
Time: 1:00 p.m.  
Courtroom: 3, Third Floor

I, Laura Brandenburg, declare as follows:

1. I am licensed to practice before this Court and an associate in the law firm of  
Levin Simes Kaiser & Gornick LLP, attorneys of record for Plaintiffs in this matter. I have personal  
knowledge of the facts set forth below, and would and could competently testify to each of them if  
called upon to do so.

2. Attached as Exhibit A is a true and correct copy of Plaintiffs' Notice of Opposition to  
CTO-5, filed May 7, 2008.





## **EXHIBIT A**

**BEFORE THE JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION**


**MDL No. 1909 – In re Gadolinium Contrast Dyes Products Liability  
Litigation**

*Moorehouse v. Bayer Healthcare Pharmaceuticals, Inc., et al.*  
N.D. California, C.A. No. 4:08-cv-01831-SBA

**NOTICE OF OPPOSITION TO CTO-5**

I represent plaintiffs in the above captioned action which is included on the conditional transfer order (CTO-5). Plaintiff submits this opposition to the conditional transfer order. I understand that the motion and brief to vacate are due in 15 days.

Sincerely,

  
Laura Brandenburg, Esq.  
LEVIN SIMES KAISER & GORNICK LLP  
44 Montgomery Street, 36 Floor  
San Francisco, CA 94104  
(415) 646-7161  
lbrandenberg@lskg-law.com  
Counsel for Plaintiffs

## **EXHIBIT B**

**UNITED STATES JUDICIAL PANEL**  
**on**  
**MULTIDISTRICT LITIGATION**

**CHAIRMAN:**  
Judge John G. Heyburn II  
United States District Court  
Western District of Kentucky

**MEMBERS:**  
Judge D. Lowell Jensen  
United States District Court  
Northern District of California

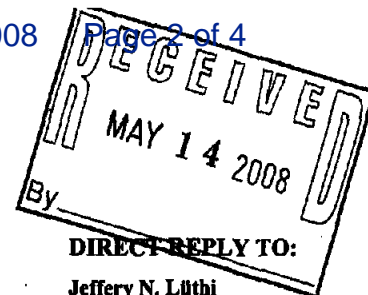
Judge J. Frederick Motz  
United States District Court  
District of Maryland

Judge Robert L. Miller, Jr.  
United States District Court  
Northern District of Indiana

Judge Kathryn H. Vratil  
United States District Court  
District of Kansas

Judge David R. Hansen  
United States Court of Appeals  
Eighth Circuit

Judge Anthony J. Scirica  
United States Court of Appeals  
Third Circuit



**DIRECT REPLY TO:**

Jeffery N. Lüthi  
Clerk of the Panel  
One Columbus Circle, NE  
Thurgood Marshall Federal  
Judiciary Building  
Room G-255, North Lobby  
Washington, D.C. 20002

Telephone: (202) 502-2800  
Fax: (202) 502-2888  
<http://www.jpml.uscourts.gov>

May 8, 2008

Laura Brandenburg, Esq.  
LEVIN SIMES KAISER & GORNICK LLP  
44 Montgomery Street  
36th Floor  
San Francisco, CA 94104

Re: MDL No. 1909 -- IN RE: Gadolinium Contrast Dyes Products Liability Litigation

Carol Moorhouse, et al. v. Bayer Healthcare Pharmaceuticals, Inc., et al.,  
N.D. California, C.A. No. 4:08-1831 (Judge Sandra Brown Armstrong)

Motion and Brief Due on or before: **May 23, 2008**

Dear Ms. Brandenburg:

We have received and filed your Notice of Opposition to the proposed transfer of the referenced matter for coordinated or consolidated pretrial proceedings. In accordance with Rule 7.4(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425, 435 (2001), the conditional transfer order is stayed until further order of the Panel. You must adhere to the following filing requirements:

- 1) **Your Motion and Brief to Vacate the Conditional Transfer Order must be received in the Panel office by the due date listed above. An ORIGINAL and FOUR copies of all pleadings, as well as a COMPUTER GENERATED DISK of the pleading in Adobe Acrobat (PDF) format, are currently required for filing. Fax transmission of your motion and brief will not be accepted. See Panel Rule 5.12(d). Counsel filing oppositions in more than one action are encouraged to consider filing a single motion and brief with an attached schedule of actions.**
- 2) **Papers must be served on the enclosed Panel Service List. Please attach a copy of this list to your certificate of service. (Counsel who have subsequently made appearances in your action should be added to your certificate of service).**
- 3) **Rule 5.3 corporate disclosure statements are due within 11 days of the filing of the motion to vacate.**
- 4) **Failure to file and serve the required motion and brief within the allotted 15 days will be considered a withdrawal of the opposition and the stay of the conditional transfer order will be lifted.**

Any recent official change in the status of a referenced matter should be brought to the attention of the clerk's office as soon as possible by facsimile at (202) 502-2888. Your cooperation would be appreciated.

Very truly,

Jeffery N. Lüthi  
Clerk of the Panel

By Dana L. Stewart  
Deputy Clerk

Enclosure

cc: Panel Service List  
Transferee Judge: Judge Dan A. Polster  
Transferor Judge: Judge Sandra Brown Armstrong

JPML Form 37

**IN RE: GADOLINIUM CONTRAST DYES PRODUCTS  
LIABILITY LITIGATION**

MDL No. 1909

**PANEL SERVICE LIST (Excerpted from CTO-5)**

Carol Moorhouse, et al. v. Bayer Healthcare Pharmaceuticals, Inc., et al.,  
N.D. California, C.A. No. 4:08-1831 (Judge Sandra Brown Armstrong)

Galen Driscoll Bellamy  
WHEELER TRIGG KENNEDY LLP  
1801 California Street  
Suite 3600  
Denver, CO 80202

Aggie Byul Lee  
TUCKER ELLIS & WEST LLP  
515 South Flower Street  
42nd Floor  
Los Angeles, CA 90017-2223

Laura Brandenburg  
LEVIN SIMES KAISER & GORNICK LLP  
44 Montgomery Street  
36th Floor  
San Francisco, CA 94104

Deborah A. Moeller  
SHOOK HARDY & BACON LLP  
2555 Grand Boulevard  
Kansas City, MO 64108-2613

Peter J. Brodhead  
SPANGENBERG SHIBLEY & LIBER LLP  
1900 East Ninth Street  
Suite 2400  
Cleveland, OH 44114

Frank C. Rothrock  
SHOOK HARDY & BACON LLP  
Jamboree Center, Suite 1600  
5 Park Plaza  
Irvine, CA 92614-2546

Michael L. Fox  
SEDGWICK DETERT MORAN  
& ARNOLD LLP  
One Market Plaza Steuart Tower  
8th Floor  
San Francisco, CA 94105

Amy W. Schulman  
DLA PIPER US LLP  
1251 Avenues of the Americas  
27th Floor  
New York, NY 10020-1104

Stephanie A. Hingle  
KUTAK ROCK LLP  
515 South Figueroa Street  
Suite 1240  
Los Angeles, CA 90071-3329

Susan M. Sharko  
DRINKER BIDDLE & REATH LLP  
500 Campus Drive  
Florham Park, NJ 07932-1047

Rodney M. Hudson  
DRINKER BIDDLE & REATH LLP  
50 Fremont Street  
20th Floor  
San Francisco, CA 94105-2235

Thomas N. Sterchi  
BAKER STERCHI COWDEN & RICE LLC  
2400 Pershing Road  
Suite 500  
Kansas City, MO 64108-2504

## **EXHIBIT C**

Inasmuch as no objection is pending at this time, the stay is lifted.

MAY - 9 2008

CLERK'S OFFICE  
JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION

IN RE: GADOLINIUM CONTRAST DYES PRODUCTS  
LIABILITY LITIGATION

(SEE ATTACHED SCHEDULE)

CONDITIONAL TRANSFER ORDER (CTO-5)

On February 27, 2008, the Panel transferred 20 civil actions to the United States District Court for the Northern District of Ohio for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. See \_\_\_ F.Supp.2d \_\_\_ (J.P.M.L. 2008). Since that time, 59 additional actions have been transferred to the Northern District of Ohio. With the consent of that court, all such actions have been assigned to the Honorable Dan A. Polster.

It appears that the actions on this conditional transfer order involve questions of fact that are common to the actions previously transferred to the Northern District of Ohio and assigned to Judge Polster.

Pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425, 435-36 (2001), these actions are transferred under 28 U.S.C. § 1407 to the Northern District of Ohio for the reasons stated in the order of February 27, 2008, and, with the consent of that court, assigned to the Honorable Dan A. Polster.

This order does not become effective until it is filed in the Office of the Clerk of the United States District Court for the Northern District of Ohio. The transmittal of this order to said Clerk shall be stayed 15 days from the entry thereof. If any party files a notice of opposition with the Clerk of the Panel within this 15-day period, the stay will be continued until further order of the Panel.

A CERTIFIED TRUE COPY

MAY - 9 2008

ATTEST *[Signature]*  
FOR THE JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

FOR THE PANEL:

*[Signature]*  
Jeffery N. Luthi  
Clerk of the Panel

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

APR 23 2008

FILED  
CLERK'S OFFICE

FILED  
2008 MAY 15 AM 11:50  
U.S. DISTRICT COURT  
OF OHIO  
CLEVELAND  
JUL No. 1909



**IN RE: GADOLINIUM CONTRAST DYES PRODUCTS  
LIABILITY LITIGATION**

MDL No. 1909

**SCHEDULE CTO-5 - TAG-ALONG ACTIONS**

**DIST. DIV. C.A. #**

**CASE CAPTION**

**CALIFORNIA NORTHERN**

~~CAN 4 08-1831~~

~~Carol Moorhouse, et al. v. Bayer Healthcare Pharmaceuticals, Inc., et al.  
Opposed 5/8/08~~

**NEW YORK SOUTHERN**

NYS 1 08-3385

David W. Lafforthun, et al. v. GE Healthcare, Inc., et al.

NYS 1 08-3387

Shiral Stidham v. General Electric Co., et al.

NYS 1 08-3389

Pavel Mamut, etc. v. General Electric Co., et al.

NYS 1 08-3427

Vauna Kathleen Ratner, et al. v. General Electric Co., et al.

**PENNSYLVANIA EASTERN**

PAE 2 08-1605

Dorothy Karros, et al. v. General Electric Co., et al.

**TENNESSEE MIDDLE**

TNM 1 08-20

Sandra Litaker v. General Electric Co., et al.

1  
2  
3  
4  
5  
6 **UNITED STATES DISTRICT COURT**  
7 **NORTHERN DISTRICT OF CALIFORNIA - OAKLAND**  
8

9 CAROL MOORHOUSE and JAMES  
10 MOORHOUSE,

11 Plaintiffs,

12 vs.

13 BAYER HEALTHCARE  
14 PHARMACEUTICALS, INC.; BAYER  
15 HEALTHCARE LLC; GENERAL ELECTRIC  
16 COMPANY; GE HEALTHCARE, INC.;  
17 COVIDIEN, INC.; MALLINCKRODT, INC.;  
18 BRACCO DIAGNOSTICS, INC.; McKESSON  
19 CORPORATION; MERRY X-RAY  
20 CHEMICAL CORP.; and DOES 1 through 35

21 Defendants.

Case No: 4:08-cv-01831-SBA

(San Francisco County Superior Court,  
Case No.: CGC-08-472978)

**[PROPOSED] ORDER DENYING  
DEFENDANTS GENERAL ELECTRIC  
COMPANY AND GE HEALTHCARE INC.'S  
APPLICATION TO STAY ALL  
PROCEEDINGS PENDING TRANSFER TO  
MDL**

Date: June 10, 2008  
Time: 1:00 p.m.  
Courtroom: 3, Third Floor

22 Before the Court is an Application to Stay all proceedings pending transfer to the Multi-District  
23 Litigation, known as In re: Gadolinium Contrast Dyes Products Liability Litigation ("MDL"), filed by  
24 Defendants General Electric Company and GE Healthcare ("GE"). Also before the Court is Plaintiffs'  
25 Motion for Remand. After reading and considering the arguments presented by the parties, and for the  
26 reasons that follow, the court DENIES GE's Application to Stay.

27 **I. BACKGROUND**

28 Plaintiff Carol Moorhouse has nephrogenic systemic fibrosis ("NSF"). Plaintiffs allege that

1 Mrs. Moorhouse contracted NSF as a result of receiving injections of gadolinium-based contrast  
2 agents (“GBCA”) in connection with MRI and MRA procedures. Plaintiffs’ complaint alleges causes  
3 of action for product liability-failure to warn, negligence, fraud, negligent misrepresentation,  
4 violations of the CLRA and a claim for loss of consortium. Defendants Bayer HealthCare  
5 Pharmaceuticals, Inc., Bayer HealthCare LLC, General Electric Company, GE Healthcare, Inc.,  
6 Covidien, Inc., Mallinckrodt, Inc. and Bracco Diagnostics manufacture GBCAs. Defendants  
7 McKesson and Merry X-Ray distribute GBCAs.

8 Plaintiffs filed this action on March 5, 2008 in San Francisco Superior Court. GE removed this  
9 matter on April 4, 2008 on the basis of diversity jurisdiction. Plaintiffs filed their Motion for Remand  
10 on April 22, 2008. GE filed their Application to Stay All Proceedings Pending Transfer to the MDL  
11 on April 24, 2008. On May 7, 2008, Plaintiffs filed their Notice of Opposition to CTO-5 with the  
12 Judicial Panel on Multidistrict Litigation. Pursuant to Rule 7.4(c) of the Rules of Procedure of the  
13 Judicial Panel on Multidistrict Litigation, the CTO is currently stayed pending further order of the  
14 Panel.

## 15 II. LEGAL STANDARD

16 Requests for transfer pending before the MDL Panel do not limit the pre-trial jurisdiction of the  
17 district court. *Conroy v. Fresh Del Monte Produce Inc.*, 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004);  
18 *Gerber v. Bayer Corp.*, 2008 U.S. Dist. Lexis 12174, \*5 (Case No. 07-05918, N.D. Cal. 2008); *Rivers*  
19 *v. Walt Disney Co.*, 980 F. Supp. 1358, 1359 (C.D. Cal. 1997). District Courts have discretion to  
20 decide whether to stay a case pending a decision from the MDL Panel. *Conroy*, 325 F. supp. 2d at  
21 1053. “A district judge should not automatically stay discovery, postpone rulings on pending motions,  
22 or generally suspend further rulings upon a parties' motion to the MDL Panel for transfer and  
23 consolidation.” *Rivers* 980 F. Supp. at 1360.

24 A motion to remand is considered a preliminary jurisdictional issue that should be resolved as  
25 early as possible. *Conroy*, 325 F. supp. 2d at 1053; *Rivers* 980 F. Supp. at 1361-1362. “Where case-  
26 specific issues of fact or law are raised by a motion to remand and a defendant has clearly failed to  
27 meet the substantive or procedural requirements for removing a state court action, ‘the court should  
28

promptly complete its consideration and remand the case to state court.” *Edsall v. Merck & Co.*, 2005 U.S. Dist. Lexis 42408, \*9 (Case No. 5-2244, N.D. Cal. 2005) (citations omitted).

### III. ANALYSIS

Courts employ a three step methodology in considering a motion to stay pending transfer to an MDL prior to a motion for remand:

- 1) Preliminary scrutiny is given to the motion for remand, and the case is remanded if removal was improper;
- 2) If the jurisdictional issues appear factually or legally difficult, consideration is given to whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL;
- 3) If the second inquiry is reached and answered affirmatively, the court weighs the following factors: a) interests of judicial economy; b) hardship and inequity to the moving party; and c) potential prejudice to the non-moving party.

*Conroy v. Fresh Del Monte*, 325 F. Supp. 2d 1049, 1053; *Meyers v. Bayer AG*, 143 F. Supp 2d 1044, 1048-1049 (E.D.Wis.1002); *Strong v. Merck & Co.*, 2005 U.S. Dist. LEXIS 2413, at \*7 (Case No. 03-813, N.D. Cal. 2005); *Edsall*, 2005 U.S. Dist. LEXIS 42408 at \*8.

In consideration of the first factor, the Court finds that removal was improper for the reasons set forth in Plaintiffs’ Motion for Remand, and REMANDS this case to San Francisco Superior Court. Thus, GE’s Application to Stay need not be considered.

Even if the Court considered GE’s Application to Stay with Plaintiffs’ competing Motion for Remand, such a stay would not be granted.

In consideration of the second factor, there is no evidence that other cases in the MDL involve the jurisdictional issue of fraudulent joinder of California distributors McKesson and Merry X-Ray.

Finally, granting GE’ Application to Stay would result in inefficiency and prejudice to Plaintiffs. The jurisdictional issue involved here is whether California distributor defendants McKesson and Merry X-Ray have been fraudulently joined. The claims as pled against these defendants, including negligence and violation of the CLRA, employ California law. As previously

1 explained by this Court:

2 This Court is readily familiar with federal law, Ninth Circuit law, and  
3 California law, the laws applicable to Plaintiff's motion and Complaint.  
4 Moreover, the parties have already fully briefed the issue of remand.  
5 Thus, staying the motion will not save either party any time. Finally, it is  
6 in the interest of judicial economy to decide issues of jurisdiction as early  
7 in the litigation process as possible. If federal jurisdiction does not exist,  
the case can be remanded before federal resources are further expended. In  
the Court's view, judicial economy dictates a present ruling on the remand  
issue.

8 *Conroy*, 325 F. Supp. 2d at 1054

9 The same analysis applies here. This Court is better equipped to determine California legal  
10 issues than is the MDL Court in Ohio.

11 Finally, GE has not asserted that it will suffer hardship if this matter is not stayed. On the  
12 contrary, Plaintiffs will suffer delays waiting for a transfer to occur. Importantly, the conditional  
13 transfer order has been stayed pending further order from the Panel. If GE's stay is granted, Plaintiffs  
14 case will not be transferred to the MDL until an order from the Panel is issued. This could take several  
15 months. If this case is then transferred to the MDL, it will take several additional months for  
16 Plaintiffs' motion for remand to be heard. Such delays are prejudicial to Plaintiff.

#### 17 IV. CONCLUSION

18 The Court finds that Plaintiffs' Motion for Remand should be considered prior to GE's Motion  
19 to Stay. Removal was not proper, there is no evidence that identical or similar jurisdictional issues  
20 have been, or will be raised in the MDL, and a stay and transfer would result in inefficiency and  
21 prejudice to Plaintiffs. Having first considered and GRANTED Plaintiffs' Motion for Remand, the  
22 Court DENIES GE's Application to Stay All proceedings Pending Transfer to the MDL as MOOT.

23 IT IS SO ORDERED.

24  
25 Dated: \_\_\_\_\_

\_\_\_\_\_  
26 HONORABLE SAUNDRA B. ARMSTRONG

Lawrence J. Gornick (SBN 136290)  
Debra DeCarli (SBN 237642)  
**LEVIN SIMES KAISER & GORNICK LLP**  
44 Montgomery Street, 36<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 646-7160  
Fax: (415) 981-1270  
[lgornick@lsgk-law.com](mailto:lgornick@lsgk-law.com)  
[ddecarli@lsgk-law.com](mailto:ddecarli@lsgk-law.com)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA - OAKLAND**

CAROL MOORHOUSE and JAMES  
MOORHOUSE,

Plaintiffs,

vs.

BAYER HEALTHCARE  
PHARMACEUTICALS, INC.; BAYER  
HEALTHCARE LLC; GENERAL ELECTRIC  
COMPANY; GE HEALTHCARE, INC.;  
COVIDIEN, INC.; MALLINCKRODT, INC.;  
BRACCO DIAGNOSTICS, INC.; McKESSON  
CORPORATION; MERRY X-RAY  
CHEMICAL CORP.; and DOES 1 through 35

Defendants.

Case No: 4:08-cv-01831 SBA

(San Francisco County Superior Court,  
Case No.: CGC-08-472978)

**PROOF OF SERVICE**

I certify that I am over the age of 18 years and not a party to the within action; that my business address is 44 Montgomery Street, 36<sup>th</sup> Floor, San Francisco, CA 94104; and that on this date I served a true copy of the document(s) entitled:

Service was effectuated by forwarding the above-noted document in the following manner:

**PLAINTIFFS' OPPOSITION TO DEFENDANTS GENERAL ELECTRIC COMPANY AND GE HEALTHCARE INC.'S APPLICATION TO STAY ALL PROCEEDINGS PENDING TRANSFER TO MDL; DECLARATION OF LAURA M. BRANDENBERG IN SUPPORT OF PLAINTIFFS' OPPOSITION TO GENERAL ELECTRIC COMPANY AND GE HEALTHCARE INC.'S APPLICATION TO STAY ALL PROCEEDINGS PENDING TRANSFER TO MDL; [PROPOSED] ORDER DENYING DEFENDANTS GENERAL ELECTRIC COMPANY AND GE HEALTHCARE INC.'S APPLICATION TO STAY ALL PROCEEDINGS PENDING TRANSFER TO MDL**

**By Regular Mail** in a sealed envelope, addressed as noted above, with postage fully prepaid and placing it for collection and mailing following the ordinary business practices of Levin Simes Kaiser & Gornick.

**By Electronic Mail**

**By Hand Delivery** in a sealed envelope, addressed as noted above, through services provided by the office of Levin Simes Kaiser & Gornick.

**By Facsimile** to the numbers as noted below by placing it for facsimile transmittal following the ordinary business practices of Levin Simes Kaiser & Gornick.

**XX By Overnight Courier** in a sealed envelope, addressed as noted above, through services provided by (Federal Express, UPS,) and billed to Levin Simes Kaiser & Gornick.

Alan Greenberg, Esq.  
Wilson & Elser  
655 West Broadway, Suite 900  
San Diego, CA 92101  
Tel: 619-321-6200  
Email: alan.greenberg@wilsonelser.com  
Attorneys for Merry X-Ray Chemical Corp.

1 I provided the documents listed above electronically through the CM/ECF system pursuant to  
2 the instructions set forth in the Local Rules for the United States District Court for the Central District  
3 of California to:

4  
5 Rodney Hudson, Esq.  
6 Drinker Biddle & Reath LLP  
7 50 Fremont Street, 20<sup>th</sup> Floor  
8 San Francisco, CA 94105-2235  
9 Tel: 415-591-7500  
10 Fax: 415-591-7510  
11 Email: KennethConour@dbi.com  
12 Attorneys for Bayer Healthcare Pharmaceuticals Inc

13 Thomas A. Woods, Esq.  
14 Shook, Hardy & Bacon LLP  
15 Jamboree Center  
16 5 Park Plaza, Suite 1600  
17 Irvine, CA 92614-2546  
18 Tel: 949-475-1500  
19 Fax: 949-475-0016  
20 twoods@shb.com  
21 Attorneys for Defendant Malinckrodt,

22 Michael C. Zellers, Esq.  
23 Mollie Benedict, Esq.  
24 Aggie B. Lee, Esq.  
25 Tucker Ellis & West LLP  
26 515 S. Flower Street, 42nd Floor  
27 Los Angeles, CA 90071-2223  
28 Tel: 213-430-3400  
Fax: 213-430-3409  
Attorneys for Bracco Diagnostics, Inc

Deborah C. Prosser, Esq.  
Stephanie Hingle, Esq.  
Kutak Rock LLP  
515 South Figueroa Street, Suite 1240  
Los Angeles, CA 90071  
[dprosser@bwsllaw.com](mailto:dprosser@bwsllaw.com)  
[Stephanie.hingle@KutakRock.com](mailto:Stephanie.hingle@KutakRock.com)  
Attorneys for General Electric Company and GE Healthcare, Inc



1 Charles T. Sheldon, Esq.  
2 Michael L. Fox, Esq.  
3 Sedgwick, Detert, Moran & Arnold  
4 One Market Plaza, Steuart Tower  
5 8<sup>th</sup> Flr.  
6 San Francisco, CA 94105  
7 [Charles.Sheldon@sdma.com](mailto:Charles.Sheldon@sdma.com)  
8 [Michael.Fox@sdma.com](mailto:Michael.Fox@sdma.com)  
9 Attorneys for McKesson Corporation

10 I declare under penalty of perjury that the foregoing is true and correct. Executed this 20<sup>th</sup> day  
11 of May 2008 at San Francisco, California.

12 /s/ Scheryl Warr  
13 Scheryl Warr  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28